(11)

No. 87-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

—v.—

AMERADA HESS SHIPPING CORPORATION and UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF RESPONDENTS

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24

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of Respondents, Amerada Hess Shipping Corporation and United Carriers, Inc. Respondents have given consent, but consent has not been received from Petitioner. Leave to file must be sought pursuant to Rule 36.3.

NATURE OF APPLICANT'S INTEREST

Applicant has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about 3500 attorneys, federal judges, law

professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the eighty-eight years of its existence, has sponsored a wide range of legislation dealing with maritime matters including the Carriage of Goods by Sea Act ("COGSA")[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

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1 46 U.S.C. §§ 1300-1315

2 9 U.S.C. §§ 1-14.

3 *E.g.*, Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 Benedict on Admiralty, Doc. No. 3-4 at 3-34.1 -78.2 (7th ed. 1988) (hereinafter "Benedict"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-five national maritime law associations constituting the Comite Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with

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4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany (West Germany), Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Philippines, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913); Ocean Bills of Lading (1924), 51 Stat. 233 (1937); Collision (1910), *reprinted in* 6 Benedict, Doc. No. 3-2 at 3-11 -19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 Benedict, Doc. No. 5-2 at 5-11 -29; Maritime Liens and Mortgages (1967), *reprinted in* 6A Benedict, Doc. No. 8-3 at 8-25 -32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 Benedict, Doc. No. 6-3 at 6-22.103 -76.1; and Limitation of Liability for Maritime Claims, *reprinted in* 6 Benedict, Doc. 5-4 at 5-32.1 -44.2.

maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four accepted by the United States Supreme Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. A decision in favor of Petitioner would diminish the scope of federal courts' admiralty jurisdiction bestowed by the Constitution. Accordingly, we urge that this motion be granted.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES.

While all organizations and individuals involved in the law must necessarily be interested in any case in which an injured party may be deprived of a remedy, this is not the sole interest of MLA herein. MLA's interest arises from the participation of all its members in cases involving the maritime and admiralty jurisdiction.

As will be shown in MLA's brief, a decision in Petitioner's favor would deprive the federal courts of part of their constitutionally-granted admiralty jurisdiction and thus work

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6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

8 *Chick Kam Choo v. Exxon Corp.*, ____ U.S. ____, 108 S. Ct. 1684 100 L.Ed.2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

serious harm to the maritime law. As a body which has as its primary objective the preservation and proper development of admiralty and maritime law, MLA has a strong interest and can make a unique contribution in this case.

DATED: August 30, 1988.

Respectfully submitted,

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Respondents, Amerada Hess Shipping Corporation and United Carriers, Inc.

QUESTION OF LAW PRESENTED

Does a denial of jurisdiction in a case involving a claim of tort on the high seas impermissibly diminish the constitutional grant of admiralty jurisdiction?

INTEREST OF AMICUS CURIAE

This is stated in the Motion which precedes this Brief.

SUMMARY OF ARGUMENT

The Constitution provides that the judicial power of the United States extends "to all Cases of admiralty and maritime Jurisdiction . . . ." Included within this jurisdiction at the time the Constitution was drafted and first interpreted were all cases of maritime tort committed on the high seas, and prize cases involving captures by sovereign-commissioned vessels on the high seas. To preserve the constitutionality of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1331(a)(2)-(4), 1391(f), 1441(d), 1602-1611, courts must interpret that Act so as not to abridge the constitutional grant of admiralty and maritime jurisdiction. If the Act cannot be interpreted so as to preserve the constitutional grant of judicial power, to that extent the Act is unconstitutional.

ARGUMENT

I. THE ADMIRALTY AND MARITIME JURISDICTION BESTOWED BY THE CONSTITUTION EXTENDS TO ALL MARITIME TORTS ON THE HIGH SEAS, INCLUDING THOSE COMMITTED BY SOVEREIGNS.

Section 2 of Article III of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." At the time the Constitution was drafted, as shown in the early cases dealing with the extent of maritime jurisdiction, the maritime powers of United States courts included jurisdiction over torts on the high seas, including cases affecting the rights of sovereigns in times of war. As this Court stated in *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851):

> Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding.

Id. at 453. No act of Congress is required in order for the federal courts to take jurisdiction of cases involving torts on the high seas:

> [I]n the absence of every act of congress in relation to this matter, the court would feel no difficulty in pronouncing the conduct here complained of, an abuse of the neutrality of the United States; and although, in such case, the offender could not be punished, the former owner would, nevertheless, be entitled to restitution.

The Estrella, 16 U.S. (4 Wheat.) 298, 311 (1819).

That the authority to adjudicate such disputes is bestowed by the constitutional grant of admiralty jurisdiction was made clear in *L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816):

> Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction. . . .
>
> [T]he mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction . . . .

Id. at 257-58.[1] Two years later, in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), the Court held:

> The jurisdiction of the district court to entertain this suit, by virtue of its general admiralty and maritime jurisdiction, and independent of the special provisions of the prize act . . . has been so repeatedly decided by this court, that

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1 The *L'Invincible* Court considered that the question of the courts' jurisdiction to award a recovery to an injured neutral had been resolved as early as 1794 in *Glass v. The Betsey*, 3 U.S. (3 Dall.) 6 (1794). *See* 14 U.S. (3 Wheat.) at 256-57.

> it cannot be permitted again to be judicially brought into doubt.

Id. at 557-58 (footnote omitted).

The early cases demonstrate no judicial reluctance to adjudicate matters that clearly affected the rights of sovereigns by awarding damages against sovereign-commissioned captors of prizes taken in violation of international law, or restoring the captured vessels, or their value, to their owners. For example, in *The Amiable Nancy*, the Court awarded compensation to the owners of a neutral ship, which had been boarded, plundered and captured by a U.S. privateer:

> Upon the facts disclosed in evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them.

Id. at 558.

Where a public ship of a foreign state had acted illegally by augmenting her crew in a U.S. port, this Court had no hesitation in holding that cargo unlawfully and piratically taken out of a foreign vessel on the high seas must be returned to her rightful owners:

> [T]he doctrine of this court has long established, that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct.

The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 348-49 (1822).

In *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458 (1806), the Court sustained an award of compensation to the owner of a

neutral merchant vessel captured by an armed U.S. public vessel for the value of the merchant vessel and her cargo because there was insufficient cause for the capture. This case is especially noteworthy in that the vessel and cargo had been lost to the owner before the commencement of the action and thus the ship was not within the territory of the United States at any time during the proceedings.

The foregoing decisions, and others in this line of cases, do not ignore the principles of sovereign immunity in ruling on the propriety of seizures; indeed, they recognize that if, after reviewing the evidence, the court is satisfied that the capture was made by a duly commissioned cruiser in the *legitimate* exercise of its commission—the seizure of a belligerent's property—the court must cease its inquiry. *See, e.g., L'Invincible*, 14 U.S. (1 Wheat.) at 252-58.[2] To state, however, that a sovereign cannot be held accountable in another nation's courts for the *legitimate* exercise of its wartime powers does not preclude inquiry into whether those powers were legitimately exercised or whether the captor has abused the rights of neutrals in violation of the law of nations. As noted by the *L'Invincible* Court: "Without the exercise of jurisdiction thus far, in all cases, the power of admiralty would be inadequate to afford protection from piratical capture." *Id.* at 258. Jurisdiction is not affected by the fact that the capture was made by a public armed vessel as opposed to a privateer. *Id.* at 253.[3] Accordingly, admiralty courts have consistently conducted an examination of the captor's commission, the circumstances of the capture and the

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2 *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), is often cited as authority for judicial recognition of the sovereign immunity given to warships of a friendly foreign nation, and the case so holds. This immunity, however, is given as a matter of comity during a peaceful visit in port and should not be extended to excuse a gross, unfair and unprovoked attack against a neutral merchant vessel on the high seas.

3 "As to restitution of prizes made in violation of neutrality, there could be no reason suggested for creating a distinction between the national armed vessel and the private armed vessels of a belligerent." *L'Invincible*, 14 U.S. (1 Wheat.) at 253.

nationality of the captured vessel as either a neutral or belligerent.

In the exercise of their admiralty and maritime jurisdiction, the federal courts have also guarded against violations of U.S. neutrality by captors. Even when the capture is of a belligerent vessel, the courts of a neutral nation into whose territory the prize is brought or voluntarily comes may inquire into the validity of the seizure and have a duty "to be vigilant in preventing its neutrality from being abused . . . ." *The Estrella*, 17 U.S. (4 Wheat.) at 309. This principle was also applied in *The Appam*, 243 U.S. 124 (1917), in which the Court restored a British merchant vessel captured by a German warship to her owners because the captor violated U.S. neutrality by using a U.S. port as a parking lot for its prize.[4]

The judicial power of United States courts clearly includes jurisdiction to inquire into the circumstances surrounding torts committed on the high seas, even when the alleged tort is performed by a sovereign. As the respondents herein claim to have suffered a violent dispossession of their property on the high seas, their claim falls within the traditional ambit of admiralty jurisdiction bestowed by the Constitution.

II. NEITHER THE FOREIGN SOVEREIGN IMMUNITIES ACT NOR ANY OTHER STATUTE CAN BE PERMITTED TO ABRIDGE THE CONSTITUTIONAL GRANT OF ADMIRALTY JURISDICTION TO THE FEDERAL COURTS.

As this Court stated in *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924):

> After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States, but as having become the law of the United States—subject to power in Congress to alter, qualify or supplement it as experience or

4 In the instant case, the unprovoked bombing of an unarmed merchant vessel plying the U.S. domestic trade might well be viewed as a violation of U.S. neutrality.

> changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations that have come to be well recognized. One is that *there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them* or including a thing falling clearly without.

Id. at 386 (emphasis added).

The cases cited in the foregoing section demonstrate that the admiralty jurisdiction extends to all torts committed on the high seas, regardless of the identity of the tortfeasor. Accordingly, Congress did not have power to exclude cases of maritime tort from the admiralty jurisdiction in enacting the Foreign Sovereign Immunities Act. Either the Act must be read so as not to conflict with the constitutional grant of jurisdiction or, to the extent that the Act cannot be harmonized, it must be declared unconstitutional.[5]

An act of Congress forbidding trade with France during the Napoleonic Wars was rejected by the Court as a basis for seizure of a neutral ship owned by an alien, the Court saying:

> [A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

5 As stated in *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1245 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977): "Congress might well exceed its constitutional power by bringing within the jurisdiction of an admiralty court a completely land-related accident or transaction; conversely, Congress probably could not remove from admiralty jurisdiction those types of accidents which occur on navigable water since these are conceptually, traditionally, and constitutionally admiralty matters,' . . . ." (Citation omitted.)

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). This principle also supports a reading of the Foreign Sovereign Immunities Act that comports with internationally agreed principles involving the rights of neutrals on the high seas.

III. THE FOREIGN SOVEREIGN IMMUNITIES ACT SHOULD NOT BE INTERPRETED SO AS TO PRECLUDE THE EXERCISE OF JURISDICTION HEREIN.

It is possible to harmonize the Foreign Sovereign Immunities Act with the constitutional grant of admiralty jurisdiction by reference to section 1603, which defines "United States" for the purposes of the Act as including "all territory and waters, continental or insular, *subject to the jurisdiction of the United States*." 28 U.S.C. § 1603 (emphasis added). Congress could have defined the United States territorially, but chose instead to use "jurisdiction."

Although no nation has exclusive jurisdiction over the high seas, all nations may exercise jurisdiction for some purposes, including suppression of piracy and the slave trade. *See Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-60 (1795).[6] Moreover, in a wide range of claims arising on the high seas that are adjudicated in our courts, the courts not only provide a remedy, but also define standards of conduct, something they would not ordinarily do if the seas were distinctly within the territory of another sovereign. Thus, since the United States is defined in the Foreign Sovereign Immunities Act as including all waters subject to its jurisdiction, the high seas are included within the United States as the high seas have historically been subject to the "jurisdiction" of United States admiralty courts. If this definition of the United States is applied to section 1605 of the Act, its constitutionality would be preserved as there would be

6 "That *prima facie* all piracies and trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations or by some treaty which forbids or restrains it." *Talbot v. Janson*, 3 U.S. (3 Dall.) at 159-60.

no abrogation of the constitutional grant of admiralty jurisdiction.

If this definition of United States is applied in the instant case, the claim might well be deemed to fall within the exceptions to jurisdictional immunity embodied in section 1605(a)(5).

If, however, the statute's own definition of "United States" is rejected, a constitutional problem arises in that torts such as the one alleged herein—which would clearly fall within the admiralty jurisdiction as envisioned in the Constitution and explained by the early decisions on the scope of the judicial power in admiralty—would be withdrawn from our admiralty courts, thus impermissibly diminishing the constitutional grant of admiralty and maritime jurisdiction. Congress is without power to restrict this jurisdiction, and thus, to that extent, the Act must be declared unconstitutional.

CONCLUSION

Jurisdiction over the Petitioner herein should be sustained.

Dated: August 30, 1988

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of New York and the County of New York; I am over the age of eighteen years and not a party to the within action; my business address is: 195 Broadway, New York, New York 10007.

On August 30, 1988, I served the within Motion to File *Amicus Curiae* Brief and Brief in Support of the Respondents in re: "Argentine Republic vs. Amerada Hess Shipping Corporation and United Carriers, Inc." in the United States Supreme Court, October Term 1987, No. 87-1372;

On the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 30, 1988, at New York, New York.

/s/ JEFFREY A. WEISS
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